

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL D. MCLEAN,

Plaintiff,

V.

MICHAEL J. ASTRUE, Commissioner
Of Social Security,

Defendant.

CASE NO. C11-5763 BHS

ORDER DECLINING TO ADOPT THE REPORT AND RECOMMENDATION

This matter comes before the Court on the Report and Recommendation ("R&R")

of the Honorable J. Richard Creatura, United States Magistrate Judge (Dkt. 25), and

Defendant's objections to the R&R (Dkt. 27).

On January 10, 2013, Judge Creatura issued an R&R recommending that the Court reverse the Administrative Law Judge’s (“ALJ”) conclusion that Plaintiff Michael McLean’s (“McLean”) disability ended October 25, 2007 and remand for further proceedings. Dkt. 25. On January 22, 2013, Defendant filed objections. Dkt. 27. On February 4, 2013, McLean responded. Dkt. 28.

The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or

1 modify the recommended disposition; receive further evidence; or return the matter to the
2 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

3 In this case, Defendant argues that the R&R addresses some, but not all, of the
4 ALJ's findings and the R&R does not include any harmless error analysis. The Court
5 agrees. The R&R cites two excerpts from the ALJ's written decision and states that the
6 ALJ's findings regarding credibility are "largely" found within those two excerpts. *Id.*
7 Upon review of the ALJ's written decision (Dkt. 8-2 at 8-22), the Court agrees that most,
8 but not all, of the ALJ's findings are within those two excerpts. When some, but not all,
9 of an ALJ's findings are found to be invalid, the Court must engage in a harmless error
10 analysis to determine "whether the ALJ's decision remains legally valid, despite such
11 error." *Carmickle v. Commissioner, Social Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir.
12 2008). Although McLean asserts that the "Magistrate Judge correctly found this error
13 was harmful," McLean fails to cite such finding despite numerous other cites to the R&R.
14 Dkt. 28 at 5. The Court is unable to find a harmless error analysis in the R&R.
15 Therefore, the Court declines to adopt the R&R and re-refers the matter for further
16 proceedings.

17 **IT IS SO ORDERED.**

18 Dated this 27th day of February, 2013.

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BENJAMIN H. SETTLE
United States District Judge